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In the
Supreme Court of the United States

January Term, 1980

NO. 79-1081

RICHARD DRESSEL, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Richard Dressel prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in favor of the Respondent in this action on December 13, 1979.

OPINION BELOW

The opinion of the United States Court of Appeals, Tenth Circuit, has not yet been formally published but the Slip Opinion is appended to this Petition as Appendix A. This case was in the United States Court of Appeals, Tenth Circuit as Case No. 78-1515, which affirmed the Judgment for the Respondent, in the United States District Court for the District of Colorado.

JURISDICTION

The opinion of the Court of Appeals appended as Appendix A was filed and a Judgment entered in accord therewith on December 13, 1979. The jurisdiction of this Court is invoked under Title 28, United States Code, §1254(1).

QUESTIONS PRESENTED

1. Was the evidence sufficient to sustain a judgment of conspiracy, under Title 18, U.S.C. §1962(d)?

2. Was the evidence sufficient to sustain a judgment of conspiracy to commit a "pattern of racketeering activity", Title 18, U.S.C. §1962, wherein the defendant was found not guilty of the specified acts which formed the "pattern of racketeering activity"?

STATUTE INVOLVED

The Statute involved is Title 18, United States Code, §1962.

STATEMENT OF THE CASE

The Defendant-Appellant, Richard L. Dressel (hereinafter referred to as Defendant or by name) was indicted along with four other defendants in a twelve count indictment. Two of the other defendants were given a separate trial on two of the counts and after that trial all of the charges were dismissed as to one of those defendants and a negotiated plea was entered by the defendant, Paul R. Ervin, who agreed to become a government witness.

Thereafter, Mr. Dressel and two defendants proceeded to trial on May 1, 1978, in the United States District Court, for the District of Colorado.

Each of these three defendants was charged in Count I of conspiracy to commit a "pattern of racketeering activity" in violation of Title 18, United States Code, Sections 1961, 1962(d) and 1963. In addition, each defendant was charged in Count II of committing a "pattern of racketeering activity" in violation of Title 18, United States Code, Sections 1961, 1962(c) and 1963. Each defendant was also charged with two counts of wire fraud in violation of Title 18, United States Code, Section 1343. In summary, each defendant was tried on four separate counts.

After hearing the evidence, the jury found Richard Dressel not guilty on all three of the substantive counts but returned a verdict of guilty as to Count I, conspiracy to commit a pattern of racketeering activity. The conviction was appealed to the Court of Appeals, Tenth Circuit, which affirmed.

The evidence at trial established that a Paul Ervin was the owner of the Paul R. Ervin Trucking, Inc., located at Sterling, Colorado. (TR Vol. II-92) This company was engaged in the buying, selling and hauling of grain. (TR Vol. II-94) The Company owned about 15 trucks (tractors) and 22 or 23 trailers (TR Vol. II-93); and employed approximately 100 truck drivers over a period of five years. (TR

Vol. II-142) However, Richard Dressel was never employed by Paul Ervin or his corporation (TR Vol. II-142) and was never an officer or director or otherwise associated with the company.

The testimony established that Paul Ervin had an agreement with the drivers employed by him to pay them 23% of the gross profit realized on each trip. (TR Vol. II-100, TR Vol. II-101) In addition, he developed a "load bonus system" (TR Vol. II-101) wherein he would split 50/50 with his employee drivers any gain in weight of over 1,000 pounds on each load. These weight gains were obtained by the driver using "double weighing" techniques, air brakes, air bags, "pulling the scales" and other techniques. He even provided one of his employees with blank scale tickets and a printing kit (TR Vol. II-116) and would informally discuss the scheme with some of his employees. (TR Vol. II-119)

In addition, Ervin instructed his employees to call his office daily when they were on the road. (TR Vol. II-133)

However, the relationship between Ervin and Richard Dressel was quite different. Dressel owned his own truck and trailer. He hauled only occasionally for Ervin (TR Vol. II-99) and did not participate in any "load bonus" scheme. (TR Vol. II-143) He simply paid a brokerage fee of ten percent (10%) from his gross (TR Vol. II-100) to Ervin for deliveries made for Ervin.

In addition, Ervin exercised no control as supervisor over this defendant. They had no agreement, understanding nor instruction to call in when he delivered a load for Ervin (TR Vol. II-169)

Furthermore, no blank scale tickets or printing devices were ever given to this defendant. (TR Vol. III-9) and he was not present at any meetings wherein the load-bonus scheme was discussed.

In fact, Ervin, the Government's witness, could not determine if any of the "trips" charged to Mr. Dressel were made by Richard Dressel or by his brother Rodney. (TR Vol. II-157, 158, 161 and 163) and Rodney Dressel himself testified that the trips of March 18, 1977 and February 22, 1977, were in fact, made by him — not Richard Dressel. (TR Vol. IV-164)

Another witness, Steven Yost, testified that although Richard Dressel was charged in the indictment with hauling a load on December 30, 1976, at Casa Grande, Arizona, he was personally with Mr. Dressel at Monte Vista, Colorado, on that date. (TR Vol. IV-176) This was verified by the Government's witness, Juanita Phythian, who testified that Richard Dressel was at the elevator in Monte Vista on December 30, 1976. (TR Vol. IV-118)

The evidence relating to Richard Dressel was very minimal throughout the trial. As to specific subjects it was as follows:

1) AIR BAGS — (TR Vol. II-109)

U.S. Atty. "Q. What about Mr. Dressel?

Ervin A. I don't know if he had one on his truck or not. He did at one time, I guess, but at the time of the search warrant, I don't believe he had one, and I don't know whether he had one - - I don't think he had one when he hauled for me."

2) CONVERSATIONS WITH OTHERS — (TR Vol. II-114)

U.S. Atty. "Q. Let me ask you about Mr. Dressel. Did you ever have a conver-

sation with him about excessive weight gains on trips that he drove for you?

Ervin A. Not so much. He didn't haul too many loads for me. I don't believe the gains was severe, if I remember right."

The witness Ervin was again asked about conversations concerning air bags (TR Vol. II-138) and he stated he had no such conversations with Mr. Dressel. (TR Vol. II-138)

Testimony was presented establishing that Richard Dressel delivered a grain auger to the premises of the Ervin Company. (TR Vol. II-126) However, there was no evidence establishing that this was done for any illegal purpose or in furtherance of any conspiracy. In fact, several witnesses testified that an auger was used to transfer grain from the ground to trailers and from one trailer to another and to add additional grain to trailers. (TR Vol. III-37, 70, 71, 73 and 135) (TR Vol. IV-166)

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The evidence was insufficient as a matter of law to support a conviction of conspiracy under Title 18, U.S.C. §1962(d).

2. The evidence was insufficient to sustain a judgment of conspiracy to commit a "pattern of racketeering activity", Title 18, U.S.C. §1962, wherein the defendant was found not guilty of the specified acts which formed the "pattern of racketeering activity".

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT A CONVICTION OF CONSPIRACY UNDER TITLE 18, U.S.C. §1962(d) BY THE APPELLANTS.

II. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A JUDGMENT OF CONSPIRACY TO COMMIT A "PATTERN OF RACKETEERING ACTIVITY", TITLE 18, U.S.C. §1962, WHEREIN THE DEFENDANT WAS FOUND NOT GUILTY OF THE SPECIFIED ACTS WHICH FORMED THE "PATTERN OF RACKETEERING ACTIVITY."

In determining the sufficiency of evidence to support a conviction, the law is clear that all of the evidence must be viewed in the light most favorable to the government. *O'Neal v. United States,* (10th Cir.) 1957, 240 F.2d 700, 701; *Doty v. United States,* (10th Cir.) 1968, 416 F.2d 887.

In addition, conspiracies often are established by circumstantial evidence and the Court is required to look at the conduct of an individual and the inferences to be drawn from such c nduct, *United States v. Butler,* (10th Cir.) 197 F.2d 561, *Jones v. United States,* (10th Cir.) 1958 251 F.2d 288, 290, in order to determine if a person subjectively entered into an agreement to violate the law, *United States v. Butler,* (10th Cir.) 1974 494 F.2d 1246, *Carter v. United States,* (10th Cir.) 333 F.2d 354.

This is the factual situation which was presented to the jury in this case. No witness presented testimony of any conversation by Mr. Dressel indicating he "knowingly" agreed to take part in any conspiracy.

In an effort to establish a guideline in determining the subjective state of a defendant's mind, some courts have promulgated the "slight evidence" rule. This rule is that:

> "Once the existence of a conspiracy has been established, only *slight evidence* is required to connect a defendant with it."
>
> *United States v. Cloughessy,* (9th Cir.) 1977 572 F.2d 190; *United States v. Knight,* (9th Cir.) 1969 416 F.2d 1181, 1184. (Emphasis my own)

I believe the rule needs some discussion and clarification to prevent missapplication in this case. In the case at bar, the Government did clearly establish a conspiracy between Ervin and his employees. The rule was not intended to modify or lessen the burden of proof imposed on the prosecution. The Ninth Circuit Court of Appeals later clarified this rule in the case of *United States v. Dunn,* (9th Cir.) 1977 564 F.2d 348 as follows:

> "Accordingly, we think it appropriate here to restate the slight evidence rule correctly and as we are reasonably certain that our predecessors intended it: Once the existence of a conspiracy is established, evidence establishing beyond a reasonable doubt a connection of a defendant with the conspiracy, even though the connection is slight, is sufficient to convict him with knowing participation in the conspiracy. Thus, the word "slight" properly modified "connection" and not "evidence". It is tied to that which is proved, *not to the type of evidence or the burden of proof."*

In other words, although a conspiracy was proven between Ervin and the drivers employed by him, the Government must prove beyond a reasonable doubt each essential element of conspiracy, as charged, against Mr. Dressel individually.

These elements are that Mr. Dressel knew of the actual existence of the conspiratorial agreement between Ervin and his drivers and that with that knowledge they agreed to take part in it. *United States v. Dyar,* (5th Cir.) 1978

574 F.2d 1385. Evidence which creates suspicion or insinuation of guilt of conspiracy is not enough to sustain a conviction. *United States v. McMahon,* (10th Cir.) 1977 562 F.2d 1192; *United States v. Butler,* (10th Cir.) 1974 494 F.2d 1246.

The alleged conspiratorial agreement as set forth in the indictment was an ". . . . agreement to defraud grain elevator companies, farmers, cooperative associations, and . . . [others] from whom they purchased . . . and sold grain and other commodities by utilizing fraudulent . . . weighing techniques . . . and sharing the proceeds according to a 'load bonus' system".

Turning to the question as to whether Mr. Dressel had knowledge of any such agreements, we find that the conduct and action of all the parties indicates no requisite knowledge. The evidence is clear and unequivocal that Dressel neither participated in the "load bonus" system nor received the 50-50 split that Erwin paid to the drivers in his employment. It becomes even more obvious that Dressel had no knowledge of the conspiratorial agreement when the difference in compensation is considered. Ervin provided his drivers with trucks at Ervin's expense. In addition, he paid all expenses on his driver's trip such as gas, oil, and maintenance of the trucks. Even after paying all of these expenses and providing the trucks and equipment, Ervin then split with his own drivers on an equal basis, any money or proceeds collected as a result of the driver obtaining a weight gain in excess of 1,000 pounds.

However, Richard Dressel purchased, owned and provided his own truck and trailers for the occasional loads which he hauled for Ervin.

Ervin testified that Dressel only occasionally hauled a load for him and that the gains on Richard Dressel's loads were quite small. Furthermore, Ervin charged Dressel only a 10 or 12 percent fee for brokering the load. I be-

lieve it obvious that if Ervin had, in addition to brokering the loads, shared information with Dressel concerning the elevator or stockyard which was most susceptible to obtaining false weight that Ervin would have required a percentage which would have more nearly equated with the 50 percent split which he received from his own drivers. Otherwise, it would have been significantly more profitable for Ervin to simply use drivers of his own organization. Furthermore, Ervin testified that he did not share any of this information with Dressel.

The testimony reflected that Ervin provided at least one, if not more, of his drivers with blank scale tickets and printing kits in order to create fraudulent weights. In addition, he held meetings with his own drivers and shared information with his drivers concerning the various aspects of his load bonus scheme. However, the evidence is clear and unequivocal that Dressel was not included in any of these meetings.

In fact, the evidence simply establishes the existence of a business association or relationship between Dressel and the Ervin Trucking Company. In the case *United States v. Quintana,* (7th Cir.) 1975 508 F.2d 867, it was held that neither association with conspirators nor knowledge that the conspirators were doing som thing illegal would by itself constitute proof of participation in a conspiracy. This reasoning was followed in the case of *United States v. Butler,* (10th Cir.) 1974 494 F.2d 1246.

One of the more recent cases in the Tenth Circuit dealing with this issue is the case of *United States v. Butler, supra.* In this case, the Honorable Judge Seth stated:

> "The conspiracy count, which named all twenty-three defendants, alleged as dual purposes of the conspiracy the violations of both 18 U.S.C., §§641 and 1361. We of course have considered the evidence in the light most favorable to the United

States. Even so we cannot find convincing evidence that Sergeant Slomkowski conspired toward either purpose. It is always difficult to evaluate evidence in a conspiracy case and because of the secretive nature of the crime, the evidence is almost invariably circumstantial. As the Supreme Court has warned, however, caution must be taken that the conviction not be obtained "by piling inference upon inference". *Direct Sales Co. v. United States,* 319 U.S. 703, 63 S.Ct. 1265, 87 L.Ed. 1674. The admonition, we think has special relevance in cases such as this, where many defendants, some of whom were not even acquainted, are charged on the basis of varying degrees of participation at various times. Guilt must be determined individually and not merely by association. Our review of the evidence must therefore be especially meticulous. The evidence, when viewed in its entirety, must generate more than a mere suspicion of guilt, and where such evidence is equally consistent with both guilt and innocence the conviction cannot be sustained. *Lewis v. United States,* 420 F.2d 1089 (10th Cir.), *Doty v. United States,* 416 F.2d 887 (10th Cir.) vacated on other grounds as to defendant Epps sub nom. *Epps v. United States,* 401 U.S. 1006, 91 S.Ct. 1247, 28 L.Ed.2d 542; *Brumbelow v. United States,* 323 F.2d 703 (10th Cir.)

The evidence against Dressel can in skeleton fashion be summarized as follows:

1. That Paul Ervin had formed a conspiracy with his employee drivers.

2. That Dressel hauled loads of grain and commodities for Paul Ervin.

3. That Dressel knew how to create false weights on his trucks or trailers.
4. That Dressel had weight gains on some of the loads he hauled for Ervin.
5. That Dressel delivered a grain auger to Ervin's premises.
6. That Ervin charged Dressel a 10 percent brokerage fee.

The Government would have the Court and the jury draw the following inferences from this evidence:

(1) That weight gains, if any, on loads hauled by Dressel were obtained by fraudulent methods.

(2) That an agreement existed between Ervin and Dressel to defraud buyers and sellers of grain and commodities and to share the proceeds of that activity.

(3) That Dressel delivered the grain auger to Ervin's premises to further the common design, purpose or object of a conspiracy.

(4) That it was Richard Dressel not Rodney Dressel who hauled loads wherein there were weight gains.

In the case of *United States v. Littrell,* (5th Cir.) 1978 574 F.2d 828 the Court made the following comment concerning the Government's evidence in that case:

> "These inferences are certainly plausible and perhaps even probable, but it is not enough for the government to prove that Littrell might have been guilty. The government must prove guilt beyond a reasonable doubt, and to do so requires the exclusion of every reasonable hypothesis but that of guilt. We do not think that is the case here, for inferences of innocent activity can reasonably be drawn from Littrell's behavior."

The same application of this principal of law applies in the case at bar. In this case, inferences of innocent activity can reasonably be drawn from behavior of the parties. The following inferences can be made from the evidence:

1. That the Dressel loads wherein there were weight gains were all made by Rodney Dressel.
2. That there were not gains on loads hauled by Richard Dressel.
3. That weight gains, if any, on loads hauled by Dressel were the result of adding additional grain to the loads from other trailers.
4. That the auger was used to transfer grain from the ground to a trailer or from one trailer to another after the primary load had settled in order to enable the trucker to carry a greater quantity of commodity on long trips.
5. That Dressel was not aware of the conspiracy between Ervin and his drivers.

In the *Littrell* case, *supra,* the Court concludes:

> "This court has held many times that association with other persons involved in a criminal enterprise is not sufficient to prove knowing participation in a conspiracy. As we said in *United States v. Caro, supra,* at 418 (5th Cir.) 1978, 'Proximity to the crime does not suffice to tip the balance,' and even 'actual presence at the scene of the crime is not sufficient'."

It could even be inferred, that Dressel had knowledge as to how to create false weights on his vehicle and that, in fact, in obtaining certain loads under the brokerage of Ervin, did independently obtain weight gains by fraudulent means. However, such an inference or presumption does not create proof of an agreement or conspiracy. Even

the fact that Ervin brokered the load and may have aided or abetted Dressel in his independent conduct would not be sufficient to prove conspiracy. *United States v. Winn,* (10th Cir.) 1969 411 F.2d 415; *Colosacco v. United States,* (10th Cir.) 1952 196 F.2d 165; *United States v Krol,* (7th Cir.) 1967 374 F.2d 776.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for certiorari be granted.

Respectfully submitted,
HEMMINGER & WHITTAKER

BY:_____

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CERTIFICATE OF SERVICE

I hereby certify that I served the above and foregoing Petition For Writ Of Certiorari upon the other parties herein by depositing a true copy thereof in the United States mail, postage prepaid, addressed to the Honorable Solicitor General of the United States, 5614 U. S. Department of Justice, Washington, D.C., 20530 on the ____ day of January, 1980.

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 78-1514 and 78-1515

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HOWARD MARTIN and
RICHARD DRESSEL,
Defendants-Appellants.

Appeal from the United States District Court for the District of Colorado (D.C. No. 77-CR-252)

Richard N. Stuckey, Assistant United States Attorney (Joseph F. Dolan, United States Attorney, on the brief), for Plaintiff-Appellee.

Gary H. Hemminger (Hemminger & Whittaker, on the brief), for Defendants-Appellants.

Before McWILLIAMS, DOYLE and McKAY, Circuit Judges.

McWILLIAMS, Circuit Judge.

A twelve-count indictment charged five defendants in a complex grain fraud and stolen truck trailer case with violations of 18 U.S.C. §1962 (Racketeering), 18 U.S.C. §1343 (Wire Fraud), and 18 U.S.C. §2315 (Receipt of Stolen Goods Moved in Interstate Commerce). The five defendants were Howard Martin and Richard Dressel, the appellants, and one Paul Ervin, James Witt and Calvin Weber. The two counts of the indictment charging the receipt of stolen truck trailers concerned Ervin and Weber only. Those two counts were severed for trial purposes, and the trial of that particular matter resulted in Ervin being convicted on one count, with the jury being unable to reach a verdict on the other count involving Ervin, or on either count involving Weber. Thereafter the Government dismissed all charges against Weber.

The charges of racketeering and wire fraud against Martin and Dressel, the appellants, and the two remaining defendants, Ervin and Witt, then came on for trial. Shortly prior to trial Ervin pled guilty to one count of the indictment, and thereafter testified as a Government witness in the trial of the remaining three defendants. The ensuing trial resulted in the defendant Witt being convicted on four counts. Witt does not appeal. Martin and Dressel were both convicted on count one which charged a conspiracy to violate *18 U.S.C. § 1962*. Martin was also convicted on count six of this indictment which charged a violation of the wire fraud statute, 18 U.S.C. § 1343.

Martin and Dressel now appeal their respective convictions. The only matter urged for reversal is the alleged insufficiency of the evidence to support their respective convictions. Our study of the record has convinced us that there is ample evidence to support the jury's verdicts, and accordingly we affirm.

Before considering the evidence adduced at trial, brief reference will be made to the legal principles which govern

this appeal. In determining whether the evidence is sufficient to support a criminal conviction, the evidence itself must be viewed in a light most favorable to the Government. This is so because a jury has already found beyond a reasonable doubt that the defendant is guilty of the crime charged. Such means that any conflict in the evidence must be resolved in favor of the Government. Also, permissible inferences must be those which support the Government's theory of the case. Substantive crimes are themselves often established by circumstantial evidence, as opposed to direct evidence, and criminal conspiracies are generally established by only circumstantial evidence. Criminal conspiracies are seldom, if ever, reduced to writing, and are generally proven by conduct, and the circumstances surrounding such conduct. United States v. Andrews, 585 F.2d 961 (10th Cir. 1978) and United States v. Birmingham, 454 F.2d 706 (10th Cir. 1971).

Brief reference to the evidence will indicate why we are convinced that the evidence in the instant case amply supports the jury's several verdicts. The Government called an array of witnesses, who generally fell into one of three categories: (1) persons who worked for the Paul Ervin Trucking Company of Sterling, Colorado, including Paul Ervin, owner of the company; (2) drivers who worked for the Ervin Trucking Company and testified concerning their fraudulent weighing techniques; and (3) victims of the scheme, including those who sold grain to Ervin Trucking Company, and those who bought grain from the company. Also, there was documentary evidence portrayed on a chart for consideration by the jury which revealed specific weight gains on numerous interstate grain hauling trips of the various drivers, including the two appellants. Neither Martin nor Dressel testified, though the defense did call two witnesses. So, for practical purpose, the evidence we are here called upon to review is that offered by the Government, and nothing more.

On appeal counsel concedes that the Government establish beyond all doubt that a conspiracy did exist involving Paul Ervin and his employee-drivers. The scheme used involved false weighings. Through the use of "air bags" and other schemes and devices, false weights could be obtained. The plan of course was to acquire more grain than the weigh-in showed was being purchased, and then sell less grain than the scales showed was being sold. In that way a profit was obtained in both the buying and the selling of a particular shipment. Such profit was split between Ervin and his employee-drivers on a 50-50 basis. We shall not here elaborate on the intricacies of the "air bags" and related fraudulent schemes and devices. Such is not necessary. It is sufficient to say that the schemes were ingenious, devious and dishonest.

As indicated, counsel concedes, as well he must, that Ervin and his employee-drivers were involved in a conspiracy. But, argues counsel, the evidence does not show that Martin and Dressel were themselves a part of that conspiracy. We disagree.

Martin and Dressel were not employees of Ervin's. However, they did work for Ervin on a contract basis. Dressel drove his own truck. Martin drove a truck belonging to his employer, James Witt, who, as mentioned above, was convicted on four counts of the indictment and did not appeal. Martin and Dressel would pick up grain purchased by Ervin in his own name, transport the grain to the ultimate buyer, all such sales having been arranged by Ervin's company. Ervin's area of business operation included Nebraska, Wyoming, Colorado and Arizona. Ervin received a so-called "brokerage fee" of 10% from Martin and Dressel out of the profit arising from each shipment. Under such scheme the greater the profit, which would be enhanced by false weighings, the greater the reward to both Martin and Dressel, as well as Ervin himself.

The evidence is such as to clearly permit the jury to find that both Martin and Dressel had "air-bags" on their respective trucks. Documentary evidence showed that both Martin and Dressel made numerous deliveries for Ervin in which there was a substantial "weight gain," i.e. the weight on delivery to the buyer was substantially greater than the weight of the grain received from the seller.

Counsel concedes, in effect, that the Government's case against Martin is perhaps stronger than that against Dressel, and argues that Dressel's conviction, if not Martin's conviction, should be reviewed. We do not agree. In addition to the incriminating evidence against both Dressel and Martin, as outlined above, there is, as concerns Dressel only, the incriminating fact that once the case "broke," Dressel's actions were such as to fully permit the jury to infer that Dressel was "covering up." Dressel produced a grain auger which was said to have been used to transfer grain from one truck to another, which was supposed to account for weight gains. One witness testified that the grain auger was produced to make it "look like" the weight gains were accounted for by legitimate grain transfers. In sum, the evidence supports the jury's verdict that Martin and Dressel were both a part of the Ervin conspiracy.

Under count six Martin was also convicted of a violation of the wire fraud statute, 18 U.S.C. § 1343. Specifically, the charge concerned an interstate wire communication between Sterling, Colorado and Phoenix, Arizona to further the fraud scheme involving an interstate trucking trip on February 10, 1977. The evidence indicated that Martin had in fact transported a shipment of cottonseed meal from Phoenix, Arizona to Ainsworth, Nebraska on or about that date, and that there was a substantial "weight gain" in the load between "weigh-in" in Phoenix and "weigh-out" in Ainsworth, Nebraska. Counsel complains that there was no direct evidence that any interstate communication was

made in connection with that particular trip. That may well be true. However, circumstantial evidence permits the inference that interstate telephone communication was in fact made. The dispatcher for the Ervin Trucking Company was a Government witness and the gist of his testimony, which was not in any manner contradicted, was that he used the telephone in connection with *all* shipments of grain made on behalf of the company. See United States v. Roselli, 432 F.2d 879, 893 and 897 (9th Cir. 1970), *cert. denied,* 401 U.S. 924 (1971) where "a pattern of interstate phone calls, interstate travel and interstate transportation" was held sufficient to sustain a conviction. In the instant case there is the same pattern, and much more.

Judgment affirmed.